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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1028

UNITED STATES OF AMERICA, PETITIONER

v.

DIMAS CAMPOS-SERRANO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (App. 124–129) is reported at 430 F. 2d 173.

JURISDICTION

The judgment of the court of appeals was entered on June 25, 1970. A petition for rehearing with suggestion for rehearing *en banc* was denied on October 1, 1970. Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to November 30, 1970. The petition was filed on November 30 and was granted on March 1, 1971. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an alien registration card is a "required record" which an alien must produce upon request by an appropriate government official.

2. Whether the court below unduly extended *Miranda* v. *Arizona*, 384 U.S. 436, by holding, on the facts of this case, that agents of the Immigration and Naturalization Service were required to give respondent warnings before asking him to produce his alien registration card.

STATEMENT

After a trial in the United States District Court for the Northern District of Illinois, at which respondent waived a jury, he was convicted of having knowingly possessed a forged alien registration receipt card, in violation of 18 U.S.C. 1546. On March 4, 1969, he was sentenced to a prison term of three years, which was suspended. He was placed on probation on condition that he return to Mexico and not reenter the United States illegally (App. 116–117).[1] The court of appeals reversed on the ground that the forged card had been illegally obtained by the government and was thus inadmissible in evidence (App. 124–129).

The pertinent facts, which are not in dispute, were developed at a pretrial hearing on respondent's motions to suppress the card and certain statements (App. 16–94). In the early morning of November 19,

[1] Respondent was remanded to the custody of the Immigration and Naturalization Service pursuant to a previous order of deportation entered in November 1968 (App. 117).

1968, a number of agents of the Immigration and Naturalization Service (INS) conducted an investigation in an area of Chicago where it was suspected that aliens unlawfully in the United States were working (App. 18–19).[2] They arrested some fifteen or sixteen aliens, including one Miguel Rico, for being in the United States in violation of the immigration laws (App. 21–22).

Rico was arrested at approximately 8:00 a.m. (App. 22) and afforded the opportunity to return to his residence to obtain personal belongings. (App. 33–34). When Rico arrived at his apartment, accompanied by INS investigators Jacobs and Burrow, they were admitted by respondent (App. 23–24). Upon entering, the agents immediately advised respondent that Rico was under arrest and was merely being allowed to obtain his belongings (App. 34–36). Burrow went with Rico to his room (App. 43). Jacobs, who remained in the living room with respondent, inquired as to respondent's citizenship. Respondent replied that he was Mexican. Jacobs next asked under what status respondent was in the United States. When respondent answered that he was a resident alien, Jacobs asked for "proof". In response, respondent produced an alien registration receipt card.[3] Jacobs inspected this

[2] Under Section 287(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1357(a)(1), immigration investigators are authorized without a warrant to "interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States."

[3] Jacobs also asked to see respondent's passport, but respondent explained that he had sent it to Mexico for fear of losing it (App. 27).

document as well as a social security card which respondent produced, and showed them to Burrow. Finding nothing amiss, the agents returned the documents to respondent.[4] They then departed with Rico (App. 26–28, 35–37, 43–44).

When they returned to the car, a third investigator, White, suggested a check of another individual approaching them (App. 56–57). Burrow spoke to the individual, Jose Rodriguez-Ortiz, and inquired as to his citizenship. He produced an alien registration receipt card which, upon examination, Burrow and White determined to have been altered (App. 45–46). They then placed Rodriguez-Ortiz under arrest, and White and Burrow went with him to obtain his personal belongings (App. 30–32, 46–48). Rodriguez-Ortiz led them to the same apartment in which Burrow and Jacobs had encountered respondent. Rodriguez-Ortiz opened the door with a key (App. 57). Upon entering, the agents advised respondent that their purpose was to permit the new arrestee to gather his clothing (App. 48). While they waited, Burrow, who was by now suspicious that respondent's card might be altered, asked him to produce his alien registration receipt card a second time (App. 48, 50). After examining it under better lighting conditions and with a flashlight, Burrow and White concluded that respond-

[4] Jacobs testified that the apartment was poorly lighted (App. 37).

ent's card had been altered (App. 52, 60).[5] He was arrested, given *Miranda* warnings, and transported to the INS offices (App. 52, 58).

The trial judge declined to suppress the card,[6] deeming it to have been voluntarily surrendered for examination on both occasions (App. 93), and subsequently found respondent guilty as charged. The court of appeals reversed, holding that the INS investigators had violated respondent's Fifth Amendment privilege against compulsory self-incrimination by failing to give *Miranda* warnings prior to their second request to examine his alien registration receipt card. The court acknowledged that the "privilege should not prevent production in the normal immigration inquiry situation" since the cards serve the non-criminal purpose of enabling the government "to be aware of the number of aliens in the country and their status" (App. 127). It accordingly held that the first request for respondent's card was valid. The court viewed the second request differently, stating that "when the inquiry itself is directed at determining a criminal violation such as in this case where the agents are looking for forged 'cards' and the defendant's card

[5] Evidence was introduced at trial that the card had originally been issued to one Diana Gloria Vargas-Garcia, who had applied for a new card (App. 110–112).

[6] The judge did suppress post-arrest admissions by respondent on the ground that they were made during a period of unnecessary delay in bringing him before a committing magistrate (App. 88–93).

had been previously examined, the privilege should apply" (*ibid.*). The court further concluded that respondent was "in custody" within the meaning of *Miranda* v. *Arizona,* 384 U.S. 436, when the agent asked to see his card the second time, and therefore that warnings were necessary (App. 128–129).

The government's petition for rehearing *en banc* was denied by a 3–3 vote of the active judges of the court of appeals (App. 130).

ARGUMENT

INTRODUCTION AND SUMMARY

1. The government's basic contention is that an alien registration receipt card is not subject to the protection of the Fifth Amendment privilege against self-incrimination. It is, rather, a public document, like a driver's license or a selective service card, which must be maintained by the individual and produced upon request by appropriate governmental agents under the "required records" doctrine. See *Marchetti* v. *United States,* 390 U.S. 39, 55–57; *Shapiro* v. *United States,* 335 U.S. 1, 32–35; *Davis* v. *United States,* 328 U.S. 582, 588–591. We submit that the privilege against self-incrimination has no application to such documents and the information they contain because the requirement of maintenance and disclosure serves a legitimate governmental regulatory function which is not "directed at a highly selective group inherently suspect of criminal activities." *Albertson* v. *Subversive Activities Control Board,* 382 U.S. 70, 79.

The court below, recognizing these factors, agreed that "the fifth amendment privilege should not prevent production [of the card] in the normal immigration inquiry situation" (App. 127).[7] It accordingly held that the privilege did not apply to the INS agent's first request for respondent's card. The court interpreted this Court's recent discussion of the "required records" doctrine in *Marchetti,* however, to bring the card within the Fifth Amendment's protection when the agent, then directing his inquiry "at determining a criminal violation" (*ibid.*), asked to see the card again. We submit that this analysis is both anomalous and erroneous. In short, the alien registration receipt card must be either a "required record" or not, whenever requested; and, we believe, it is such a document under this Court's decisions.

The court of appeals, in our view, did not properly interpret *Marchetti.* We do not read that decision as altering the "required records" doctrine as it had developed and been applied in earlier decisions such as *Shapiro* and *Davis.* And under the fully developed doctrine, we submit it is plain that the "required records" doctrine applies to alien registration receipt cards.

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[7] We do not take issue with the court of appeals' determination that the Fifth Amendment privilege against self-incrimination is an appropriate basis on which to analyze demands, such as this, for the production of documents and information. It is true, of course, that the Fourth Amendment, as well as the Fifth, is pertinent in assessing the individual interest in privacy which is involved whenever such demands are made. See *Boyd* v. *United States*, 116 U.S. 616.

It is appropriate, therefore, to begin with consideration of the development of the required records doctrine and then turn to the effect of *Marchetti*. Finally, we shall apply the standards which we believe emerge from the several pertinent cases and which we feel are responsive generally to legitimate concerns with respect to the potential scope of governmental demands for information and documents.

2. Even if an alien registration receipt card is not a "required record," we contend that the immigration agent was not required, under *Miranda* v. *Arizona*, 384 U.S. 436, to advise respondent of his rights under the Fifth and Sixth Amendments before asking him to produce the card. The court below held that the agent should have given *Miranda* warnings prior to his second request for the card. It thus ruled, in effect, that defendant was then in "custody or otherwise deprived of his freedom of action in [a] significant way." 384 U.S. at 444.

The court relied upon this Court's decision and *Orozco* v. *Texas*, 394 U.S. 324 and its own decision in *United States* v. *Dickerson*, 413 F. 2d 1111 (C.A. 7). Neither of those cases, which are factually quite dissimilar from the present one, justifies the court's conclusion. The court's opinion does not clearly indicate, more generally, whether it based its ruling that respondent was significantly deprived of his freedom upon subjective factors, such as the attitude of the agent or the feelings of respondent, or upon an assess-

ment of the objective circumstances. We argue that an objective standard, which has been adopted by courts of appeals in several circuits, should be applied. Under an objective standard, we submit, *Miranda* warnings were not required here. The factor which evidently persuaded the court of appeals to require warnings was the suspicion of the agent. But suspicion of an officer is not, by itself, sufficient to create the atmosphere of compulsion which triggers application of *Miranda* and nothing else in this case created such a setting. The circumstances here, in sum, are analogous to those in many other law enforcement contexts in which officers have a duty to investigate and to which extension of *Miranda* would not be appropriate.

I. ALIEN REGISTRATION RECEIPT CARDS ARE REQUIRED RECORDS THE PRODUCTION OF WHICH CANNOT BE RESISTED ON SELF-INCRIMINATION GROUNDS

A. THE DEVELOPMENT OF THE REQUIRED RECORDS DOCTRINE

1. The "required records" doctrine had its origin in cases asserting the duty of a custodian of corporate records or other records of a quasi-public nature to produce them upon proper request. In *Wilson* v. *United States*, 221 U.S. 361, the Court held that a corporate officer could not assert the privilege against self-incrimination with respect to corporate records in his possession. It emphasized the public responsibilities of a corporation and analogized the case to numerous decisions which had refused to permit the custodian of records required by law to be kept to

withhold them, even though they might incriminate him. The court explained (221 U.S. 380):

> The principle applies not only to public documents in public offices, but also to records required by law to be kept in order that there may be suitable information of transactions which are appropriate subjects of governmental regulation and the enforcement of restrictions validly established. There the privilege, which exists as to private papers, cannot be maintained.

See also *United States* v. *White*, 322 U.S. 694 (same result as to records of unincorporated labor union); cf. *United States* v. *Kordel*, 397 U.S. 1.[8]

This Court specifically applied the principle to "required records" in custody of an individual businessman for the first time in *Davis* v. *United States*, 328 U.S. 582.[9] Regulations of the Office of Price

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[8] The principle had been articulated earlier in *Boyd* v. *United States*, 116 U.S. 616. In that case, the Court held that a revenue statute which required an individual to produce private business records violated the Fourth and Fifth Amendments. It contrasted that situation to the permissible examination by revenue officers, in exercising control "over the manufacture or custody of excisable articles, * * * [of] the entries thereof in books required by law to be kept for their inspection." 116 U.S. at 623–624. See also *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72.

[9] The Court had, however, recognized its application to required records, irrespective of whether a business was incorporated, in *Boyd* and *Wilson*. *Wilson*, for example, cited several state cases which had refused to permit pharmacists to invoke the privilege with respect to sales of certain commodities as to which they were required to keep records. 221 U.S. at 381.

Administration required operators of filling stations to obtain gasoline ration coupons in connection with sales and to keep them at the place of business, subject to examination. Davis was arrested for selling gasoline at black market prices without receiving ration coupons from the purchasers. The arresting agents demanded that he surrender coupons in his possession for inspection, asserting that they were government property. After initially refusing to do so, Davis complied. The Court, marking "[t]he distinction * * * between property to which the Government is entitled to possession and property to which it is not," upheld the right of inspection. 328 U.S. at 588–590. It held (328 U.S. at 593):

> Where the officers seek to inspect *public* documents at the place of business where they are required to be kept, permissible limits of persuasion are not so narrow as where *private* papers are sought. The demand is one of right. When the custodian is persuaded by argument that it is his duty to surrender them and he hands them over, duress and coercion will not be so readily implied as where private papers are involved. The custodian in this situation is not protected against the production of incriminating documents. *Wilson* v. *United States, supra.* The strict test of consent, designed to protect an accused against production of incriminating evidence, has no place here. * * *

The Court next considered the "required records" doctrine in *Shapiro* v. *United States,* 335 U.S. 1. Reg-

ulations of the Office of Price Administration required each wholesaler of fruit and produce to supply for inspection records, "of the same kind as he has customarily kept," regarding the prices he charged. 335 U.S. at 5, n. 3. It was argued that the "required records" principle should not apply to Shapiro's records because—in distinction to those in *Davis*—they were private noncorporate records rather than documents which the government required to be maintained specifically for a public purpose (see Petitioner's Brief 11–22, No. 49, O.T., 1947).[10] The Court, expressly reaffirming *Wilson* and *Davis* (335 U.S. at 32–33), rejected this contention (335 U.S. at 34–35):

> [I]t cannot be doubted that the sales record which petitioner was required to keep as a licensee under the Price Control Act has "public aspects." * * * The record involved in the case at bar was a sales record required to be maintained under an appropriate regulation, its relevance to the lawful purpose of the Administrator is unquestioned, and the transaction which it recorded was one in which the petitioner could lawfully engage solely by virtue of the license granted to him under the statute.

The four dissenters in *Shapiro* expressed concern with the potential scope of governmental directives that records be made and preserved for inspection.

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[10] The government's brief in *Shapiro* (p. 19) cited several examples of cases where state courts had upheld application of the "required records" principle to documents which would not be "customarily kept." *E.g.*, *People* v. *Schneider*, 139 Mich. 673, 103 N.W. 172 (displaying licenses on motor vehicles); *People* v. *Creeden*, 281 N.Y. 413, 24 N.E. 2d 105 (record of number of hours an operator of a truck or bus may be on duty).

The majority, also cognizant of the possibility of an abuse of power, "assumed" that there are constitutional limits to the scope of such directives, but went on to express the view (335 U.S. at 32) that—

> [N]o serious misgiving that [these] bounds have been overstepped would appear to be evoked when there is a sufficient relation between the activity sought to be regulated and the public concern so that the Government can constitutionally regulate or forbid the basic activity concerned, and can constitutionally require the keeping of particular records, subject to inspection * * *.

The *Shapiro* decision evidently represented an expansion of the concept of "public records," establishing the principle that records maintained for private purposes may lose the protection they would otherwise have as private records if Congress provides that they shall be kept available for governmental inspection in connection with a legitimate regulatory scheme. It was that expansion—and not the more limited underlying doctrine of *Davis* with respect to documents created by the government for keeping by citizens engaged in regulated activity—that divided the *Shapiro* court. Similar considerations motivated the Court's subsequent decision in *Albertson* v. *Subversive Activities Control Board,* 382 U.S. 70, which—while not discussing the required records doctrine—imposed a limitation on the *Shapiro* principle. There the Court held that the privilege against self-incrimination protected the Communist Party against registration and disclosure of its membership list because

the disclosure requirement was "directed at a highly selective group inherently suspect of criminal activities" and did not focus on "an essentially non-criminal and regulatory area of inquiry * * *." 382 U.S. at 79.[11]

2. Prior to this Court's decision in *Marchetti,* then, there were essentially two limitations under the Fifth Amendment on the government's power to require maintenance and disclosure of documents and information. The requirement had to serve a legitimate regulatory purpose, and it could not have the effect of compelling members of a group inherently suspect of criminal activities to disclose those activities.

Marchetti involved a statutory system for taxing and obaining information from persons engaged in the gambling business. These persons were required to pay a special occupational and excise tax, to register annually with the Internal Revenue Service, and to supply detailed information about their business activities on a special form. They also were required to keep daily wagering records and to permit inspec-

[11] The *Albertson* court distinguished *United States* v. *Sullivan*, 274 U.S. 259. The Court held there that an individual could not, on grounds of self-incrimination, refuse entirely to file an income tax return, although it intimated that he might invoke the privilege as to specific questions. The questions on an income tax form, the Court noted in *Albertson*, were "neutral on their face and directed at the public at large." 382 U.S. at 79.

The validity of the suggestion that an individual might refuse to answer certain questions on his return is not entirely certain in light of cases subsequent to *Sullivan*. See McKay, *Self-Incrimination and the New Privacy*, 1967 Sup. Ct. Rev. 193, 215, n. 95.

tion of their books of account. Criminal penalties were provided for wilful failures to pay the occupational tax and to register. 390 U.S. at 42–44. The Court held that the system created "'real and appreciable' * * * hazards of self-incrimination" (390 U.S. at 48) for gamblers at whom it was directed and consequently that a timely claim of the Fifth Amendment privilege provides "a complete defense to * * * prosecution" under the statute (390 U.S. at 60).

The Court rejected the "required records" doctrine as a justification for the disclosure requirements. After discussing the facts of *Shapiro,* it concluded (390 U.S. at 56–57):

> [N]either *Shapiro* nor the cases upon which it relied are applicable here. * * * Moreover, we find it unnecessary for present purposes to pursue in detail the question, left unanswered in *Shapiro,* of what "limits * * * the Government cannot constitutionally exceed in requiring the keeping of records * * *" 335 U.S. at 32. It is enough that there are significant points of difference between the situations here and in *Shapiro* which in this instance preclude, under any formulation, an appropriate application of the "required records" doctrine.
>
> Each of the three principal elements of the doctrine, as it is described in *Shapiro,* is absent from this situation. First, petitioner Marchetti was not, by the provisions now at issue, obliged to keep and preserve records "of the same kind as he has customarily kept"; he was required simply to provide information, unrelated to any records which he may have maintained, about his wagering activities. This requirement is not

> significantly different from a demand that he provide oral testimony. * * * Second, whatever "public aspects" there were to the records at issue in *Shapiro*, there are none to the information demanded from Marchetti. The Government's anxiety to obtain information known to a private individual does not without more render that information public; if it did, no room would remain for the application of the constitutional privilege. Nor does it stamp information with a public character that the Government has formalized its demands in the attire of a statute; if this alone were sufficient, the constitutional privilege could be entirely abrogated by any Act of Congress. Third, the requirements at issue in *Shapiro* were imposed in "an essentially non-criminal and regulatory area of inquiry" while those here are directed to a "selective group inherently suspect of criminal activities." Cf. *Albertson* v. *SACB*, 382 U.S. 70, 79. The United States' principal interest is evidently the collection of revenue, and not the punishment of gamblers * * * but the characteristics of the activities about which information is sought, and the composition of the groups to which inquiries are made, readily distinguish this situation from that in *Shapiro*.

It is evident that the Court considered the disclosure required by this gambling tax scheme as a further extension of the kind of disclosure approved in *Shapiro*, requiring gamblers to collect for government inspection information characterized as unrelated even to the kind of records that a gambler would keep in the normal course of his business. The Court

thus considered this information as lacking "whatever public aspects there were to the records at issue in *Shapiro,*" rejecting the government's desire to obtain information as a basis for calling that information "public". And the Court further explicitly incorporated the *Albertson* principle in the required records context, noting that gamblers fall into the "inherently suspect" category. But still there was nothing in *Marchetti* that cast doubt upon the basic principle recognized in *Davis,* that the production of unquestionably public documents can be required without infringement upon the privilege against self-incrimination.

B. WHATEVER THE LIMITS OF THE REQUIRED RECORDS DOCTRINE, IT ENCOMPASSES ALIEN REGISTRATION RECEIPT CARDS

Since, as we shall presently describe in greater detail, a valid alien registration receipt card is a document issued by the government to each alien that he is required to keep and produce upon proper request, such a card falls within the same category of required records as did the ration coupons at issue in *Davis.* It is issued as a necessary aspect of a valid regulatory scheme, and the class of persons—aliens—required to possess and produce such cards is not a class inherently suspect of criminal activities. Because of the purely governmental origin and nature of the document, its status as a required record does not raise the questions that troubled the Court in *Marchetti,* or even in *Shapiro,* concerning the outer limits of

governmental power to give records and information a public character removing them from the protection of the self-incrimination clause. For that reason, we do not believe that the additional prerequisite suggested in *Marchetti*—that records or information sought by the government be of the kind customarily kept by the person regulated in the normal course of his activities—has any application to this case; that factor is pertinent only in the context of *Marchetti* or *Shapiro*, where the documents to be produced reflect the collection of data by the producer for governmental use, rather than merely the display of a document issued by the government for a regulatory purpose.

1. Alien registration receipt cards are issued, and aliens are required to possess and produce them upon proper request, in the reasonable exercise of an important regulatory scheme—the control of immigration into the United States.[12]

Under the Immigration and Nationality Act, all aliens seeking visas for entry to the United States, as well as all aliens over fourteen remaining in the United States more than thirty days who did not register prior to entry, must file a registration form. 8

[12] As we pointed out in our petition, this is a problem of considerable magnitude. In 1970, more than 373,000 aliens were admitted to this country for permanent residence, more than 493,000 aliens returned from visits abroad, 3.4 million alien crewmen were granted shore leave, and 4.8 million other aliens visited here for temporary periods. Over 345,000 deportable aliens were found by the I.N.S. of whom more than 277,000, or 80 percent, were Mexicans. 1970 Annual Report of the Attorney General at 186.

U.S.C. 1301, 1302, 1306. The form requires the alien to give information concerning himself, his entry into the United States, and his expected length of stay. 8 U.S.C. 1304(a); 8 CFR 264.1(a). Every alien who registers and is admitted is then issued some kind of evidence that he is qualified to be in the United States in a designated immigration status. 8 U.S.C. 1303, 1304(d).[13] The alien registration receipt card in question here, popularly known as a "green card," is issued to aliens admitted to the United States for permanent residence. 8 C.F.R. 264.1(b).[14] It contains the alien's picture and other identifying information as well as certification of his immigrant status. 8 CFR 264.1; see App. 119, 120.

Strict control over "green cards" and other forms of evidence of registration is maintained. Every alien over eighteen must carry his card with him at all times. Failure to do so is a misdemeanor. 8 U.S.C. 1304(e). Any alien who loses his evidence of registration must immediately apply for new evidence thereof. 8 CFR 264.1(c). If the alien is naturalized, dies, permanently departs or is deported, the card must be surrendered to the Immigration Service, as must any lost card that is found. 8 CFR 264.1(d). The green card, and comparable documents issued to other

[13] The card itself thus contains only information which is already in the government's possession. There is no question in this case that the information reflected on the card is information that the government is entitled to have.

[14] Other types of "evidence of registration" include crewmen landing permits and identification cards, border crossing cards and arrival-departure records for nonimmigrant aliens. 8 C.F.R. 264.1(b).

classes of aliens, are normally the first source of inquiry (as in this case) made by immigration investigators pursuant to their statutory power "to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States." 8 U.S.C. 1357 (a)(1). In short, a resident alien's green card is the identification document that evidences the lawfulness of his presence in the country.

The requirements of registration and maintenance of alien registration receipt cards for inspection thus facilitate the effective administration of the Immigration and Nationality Act, just as similar requirements with respect to drivers' licenses and selective service registration certificates serve valid functions in connection with motor vehicle laws and the operation of the Selective Service System. See *United States* v. *O'Brien,* 391 U.S. 367, 372–374, 377–380. A document issued by the government for such a purpose, subject to such reasonable requirements, plainly has the "public aspects" required to qualify it as a "required record."

In *Marchetti,* this Court properly observed that otherwise private records and information did not acquire "public aspects" merely because of the government's "anxiety to obtain information known to a private individual." 390 U.S. at 57. The court of appeals below translated this Court's brief discussion of "public aspects" in that context into an absolute condition that the government may require disclosure only of "records which are usually known to the public in general rather than records which are essentially personal to the indi-

vidual" and would not "'come into independent existence in the absence of government compulsion.' Note, *Required Information and the Privilege Against Self-Incrimination,* 65 Col. L. Rev. 681, 694 (1965)" (App. 126–127). It then concluded that "[c]ards which disclose whether an individual is an alien are private and the fact that public officials may require that they be kept does not make them public" (App. 127).

Such an extrapolation from *Marchetti* ignores the crucial factor that here—as not in *Marchetti*—the kind of document in question has "public aspects" from the start, and indeed is issued by the government to the holder for valid regulatory purposes. The discussion in *Marchetti* related, in contrast, to information that the Court viewed as private but for the government's interest in learning it; thus, the underlying public nature of the document in question here was lacking there. *Marchetti* held only that the desire for such information "without more," 390 U.S. at 57, did not make it sufficiently "public;" but here there was plainly "more," as there had been in *Davis.*

2. The alien registration requirement obviously is not directed at a group which is inherently suspect of criminal activities. The court below did not suggest that the general class of aliens was suspect of illegal behavior. But it evidently believed that, when "inquiry * * * is directed at determining a criminal violation" of an individual, the privilege nevertheless is applicable. It is, however, only the nature of the class, and not the circumstance of a particular

member who may incriminate himself if he complies with a disclosure requirement, that is pertinent in determining whether the privilege may apply.[15]

Persons in a non-suspect group who choose to engage in activities amenable to governmental regulation, or who are called upon to perform a duty owed by them as citizens, are properly deemed to subject themselves to reasonable record-keeping conditions of that activity. See *Mackey* v. *United States*, No. 36, O.T., 1970, Mr. Justice Brennan, concurring, slip op. at 7–8; *United States* v. *Toussie*, 410 F. 2d 1156, 1159–1160 (C.A. 2), reversed on other grounds, 397 U.S. 112; *United States* v. *Webb*, 398 F. 2d 553, 556 (C.A. 4). Thus, the lower federal courts, in criminal cases subsequent to *Marchetti*, have uniformly refused to permit defendants to raise the Fifth Amendment privilege as a defense for failure to comply with the federal registration scheme relating to the liquor industry. They have held *Marchetti* inapplicable because persons engaged in the liquor business, unlike gamblers, are not inherently suspect of criminal activities, even though the registration requirement may compel a particular individual to reveal that his operations are illegal.

[15] In World War I a conviction under a statute punishing failure to produce a selective service registration certificate upon demand was sustained against a claim, similar to that here, that compliance would have amounted to compulsory self-incrimination. *United States* v. *Olson*, 253 Fed. 233 (W.D. Wash.). See Mansfield, *The Albertson Case: Conflict Between The Privilege Against Self-Incrimination And The Government's Need for Information*, 1966 Sup. Ct. Rev. 103, 125–127; *United States* v. *Toussie*, 410 F. 2d 1156, 1159–1160 (C.A. 2), reversed on other grounds, 397 U.S. 112.

E.g., United States v. *Fricano,* 416 F. 2d 434 (C.A. 2); *United States* v. *Hunt,* 419 F. 2d 1 (C.A. 3), certiorari denied, 397 U.S. 1016; *United States* v. *Walden,* 411 F. 2d 1109 (C.A. 4), certiorari denied, 396 U.S. 931; *United States* v. *Dryden,* 423 F. 2d 1175 (C.A. 5), certiorari denied, 398 U.S. 950; *United States* v. *Whitehead,* 424 F. 2d 446 (C.A. 6) (en banc); *United States* v. *Curry,* 428 F. 2d 785 (C.A. 9); *United States* v. *Reeves,* 425 F. 2d 1063 (C.A. 10). Similarly, lower courts have sustained the requirement of declaration of imported goods under 18 U.S.C. 545 because it serves principally a legitimate revenue purpose and is not directed at a class inherently suspect of criminal activities. *United States* v. *Perez,* 426 F. 2d 799 (C.A. 9), certiorari denied, 400 U.S. 841; *United States* v. *Vaught,* 434 F. 2d 124 (C.A. 9), certiorari denied, March 22, 1971 (No. 1206, O.T., 1970); *United States* v. *Hill,* 430 F. 2d 129, 132 (C.A. 5).

The same rationale was applied specifically to alien registration requirements in *United States* v. *Sacco,* 428 F. 2d 264 (C.A. 9), certiorari denied, 400 U.S. 903. That case involved conviction of an alien for failing to register and to notify the Attorney General annually of his address. The alien contended that these requirements violated the privilege against compulsory self-incrimination. The court held there was no Fifth Amendment problem, however, since the alien registration statutes "are 'essentially non-criminal and regulatory provisions.'" 428 F. 2d at 271. The *Sacco* decision applies equally to the requirement that aliens

carry their "evidence of registration" at all times. See 8 U.S.C. 1304(d), (e). Both requirements are designed to facilitate the identical non-criminal purpose of alien immigration control. And although compliance with them may result in criminal prosecution, this is neither the primary purpose nor the anticipated effect of the requirement in the vast majority of cases.[16]

3. As we have indicated, it is our view that the third element to which the *Marchetti* opinion referred in its discussion of the "required records" doctrine—whether records are of the kind "customarily kept"—is not relevant in the context of this case. We do not dispute the court of appeals' statement that "[i]f the government did not require possession of the cards, aliens would not keep them in their normal course of affairs since they are not business records" (App. 126). But we reiterate that the restriction to records of the kind customarily kept arose in the context of determining how far the principle underlying *Davis* could be extended by attributing a "public

[16] The fact that respondent's card was forged makes no difference in terms of the "required records" doctrine. Since respondent held himself out, in response to lawful questioning, as an alien lawfully admitted for permanent residence, the INS agents were entitled to examine the "evidence of registration" on which he was relying. See 8 U.S.C. 1357(a)(1); *United States* v. *Montez-Hernandez*, 291 F. Supp. 712, 714–715 (E.D. Cal.). Similarly, police who stop a car for a traffic offense are entitled to demand production by the driver of whatever purported license he is carrying; the fact that the license is not his, or is forged, does not render the demand for it subject to the Fifth Amendment privilege.

aspect" to documents lacking a public origin. Application of such a requirement outside the special context of *Shapiro* and *Marchetti* is unwarranted and would lead to absurd results. Drivers' licenses and selective service cards, no less than alien registration receipt cards, are not customarily maintained in the absence of a governmental requirement. Most significant, the gasoline ration coupons at issue in *Davis* v. *United States, supra,* were kept only because of governmental regulations. Thus, acceptance of the court of appeals' analysis would seem to require overruling *Davis*; *Marchetti* plainly did not purport to do that. See 390 U.S. at 56–57; 72.

In any event, we do not read the Court's relatively brief discussion of the required records doctrine in *Marchetti* as establishing rigid rules for the application of that doctrine even in the context of records and information judged to be basically private. Rather, the Court found that the "points of difference in combination" between that case and *Shapiro* rendered the doctrine inapplicable there. 390 U.S. at 57. It did not state that the three elements necessarily must be present before the doctrine may apply any more than it stated that all must be absent before it will not apply.[17] The presence of a valid regulatory purpose in a non-criminal area for inquiry of a class which is not inherently suspect of criminal activity

[17] In the companion case, *Grosso* v. *United States*, 390 U.S. 62, the Court rejected application of the "required records" doctrine to the payment of the gambling excise tax although it acknowledged that "it might * * * be argued" that the records required to be kept in connection with this tax were "essen-

should, in our view, often suffice to justify application of the required records doctrine; certainly these factors are sufficient, as we have indicated, in the present case.

The evident danger of an excessive extension of the required records doctrine is that it will be employed to infringe unduly upon the privacy of the individual. See *Shapiro* v. *United States,* 335 U.S. 1, 70–71 (Mr. Justice Jackson dissenting); McKay, *Self-Incrimination and the New Privacy,* 1967 Sup. Ct. Rev. 193, 206–214. What is fundamentally at issue is the potential conflict between the government's interest in securing information needed for effective operation of its many programs in the non-criminal area and the individual's right to privacy. It has been argued that the "customarily kept" factor adds "little to the 'public aspects' element and seems to bear no relation to the values protected by the fifth amendment." Note, *The Supreme Court, 1967 Term,* 82 Harv. L. Rev. 63, 202. Whatever protection the requirement that records be of the kind "customarily kept" might provide

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tially similar to those required to be preserved by the regulations in *Shapiro.*" 390 U.S. at 68–69. Without deciding definitely whether those records were of the kind customarily kept, the Court, stressing the "other points of significant dissimilarity between this situation and that in Shapiro"—the lack of "public aspects" and the focus on an inherently suspect class—ruled "that in combination these points of difference preclude any appropriate application to these circumstances of the 'required records' doctrine." 390 U.S. at 69.

in some circumstances, its rigid application to every case would arbitrarily prevent the government from requiring disclosure of information which would not otherwise be made public but which is not of a highly personal nature and for which there is a significant need. Reports and records regarding various business and other activity which is validly subject to regulation and licensing could not be required under such an approach.

It is true that, under the "required records" doctrine, the protection of privacy will depend, to some extent as a practical matter, upon the exercise of congressional restraint. Cf. McKay, *supra,* p. 217. But there is no reason to believe that direct examination of the government's regulatory interests will not provide an appropriate basis upon which courts, when confronted with serious issues of invasion of privacy, may access the validity of the government's demands.

The qualification that a record-keeping requirement be directed at a general class, not inherently suspect of criminal activity, finally, provides a basic assurance against governmental overreaching at the expense of values protected by the Fifth Amendment. For this element excludes the possibility that government will be able, by purporting to advance regulatory goals, to establish what is, in fact, fundamentally a system of acquiring information respecting criminal violations by the simple expedient of forcing suspected individuals to admit their violations. Consequently, it will

restrict reporting requirements to areas where the basic interest is in the regulation of conduct and not its punishment. See *Mackey* v. *United States*, *supra*, Mr. Justice Brennan, concurring, slip. op. at 7–8.

II. EVEN IF RESPONDENT DID HAVE A PRIVILEGE TO WITHHOLD HIS ALIEN CARD, THE CIRCUMSTANCES OF THE AGENT'S REQUEST WERE NOT SUCH AS TO REQUIRE MIRANDA WARNINGS

1. Since respondent consented to produce his alien registration receipt card when the agents requested it, its use as evidence was valid even if it was protected by the privilege against self-incrimination. We submit that the court of appeals erred in holding that prior warnings under *Miranda* v. *Arizona*, 384 U.S. 436, were required for the protection of petitioner's privilege if he had one. The agents were not obliged to give warnings prior to either request because respondent was not in "custody or otherwise deprived of his freedom of action in any significant way." 384 U.S. at 444. Rather, the situation here is analogous to those which the Court in *Miranda* expressly indicated were not affected by its holding: "[g]eneral on-the-scene questioning as to [the] facts surrounding a crime or other general questioning of citizens in the fact-finding process * * * [where] the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present." 384 U.S. at 477–478.

There are, of course, situations, between interrogation in the classic circumstances of arrest and cus-

tody [18] and general questioning of citizens, in which the action of peace officers creates "inherently compelling pressures" on the individual "to speak where he would not otherwise do so freely." 384 U.S. at 444, 467. This Court has not, however, articulated a general standard in the variety of possible citizen-police encounters for determining whether a significant deprivation of freedom, equivalent to custody, has occurred.[19]

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[18] *Miranda* and its companion cases all presented classic "custodial" features—"incommunicado interrogation of individuals in a police-dominated atmosphere, resulting in self-incriminating statements without full warnings of constitutional rights." 384 U.S. at 445.

[19] The court has twice since *Miranda* considered its application to particular facts. *Mathis* v. *United States*, 391 U.S. 1; *Orozco* v. *Texas*, 394 U.S. 324. In each case, however, the defendants were actually under arrest or in confinement. In each, the Court held that the warnings should have been given without elaborating standards to apply when custody is not so clearly present. In *Mathis*, the defendant was interrogated by an internal revenue agent while he was in a state prison serving a sentence on an unrelated matter. The Court found that the fact that the questioning was unrelated to the detention was "too minor and shadowy" a factor to distinguish the case from *Miranda* (391 U.S. at 4). In *Orozco*, four police officers, with probable cause to believe defendant was implicated in a homicide which had occurred a few hours previously, came to his home at 4:00 A.M. and questioned him in his bedroom about the killing. One of the officers testified that *Orozco* was "under arrest" and not free to leave. Relying on this testimony, the majority held that *Orozco* had been "in custody" and that *Miranda* warnings should have been given. It rejected the State's argument that, because *Orozco* was interrogated in his home in familiar surroundings, the *Miranda* holding did not apply. 394 U.S. at 326–327.

The court of appeals held that the circumstances in this case fell "between the custodial interrogation in *Orozco* and the non-custodial interrogation" in *United States* v. *Dickerson*, 413 F. 2d 1111 (C.A. 7) (App. 129).[20] The situation here is materially different from that in either of those cases, however. The requests for respondent's card came during normal hours, not, as in *Orozco*, in the middle of the night. Two officers were present, not four, and they had come—as they advised respondent—to accompany other persons, under arrest, while they gathered their belongings, not because of suspicion focused on respondent. Nor was there a realistic possibility that respondent was unaware of the possible criminal implications of the request for his card.[21] Thus, whatever the merits of *Dickerson* in the tax field, where there is the possibility that an individual will misapprehend the nature of an investigation, that decision has no application here.[22]

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[20] In *Dickerson* the Seventh Circuit required that special agents of the Internal Revenue Service give *Miranda* warnings at the outset of any investigation despite the absence of any form of custody, because the taxpayer might be unaware of the possible criminal implications of the inquiry.

[21] Illegal entry into the United States (8 U.S.C. 1325), willful failure to register (8 U.S.C. 1306), and knowing possession of a false entry document (18 U.S.C. 1546) are among the criminal offenses to which evidence regarding an alien's registration status are pertinent.

[22] *Dickerson* has been rejected by every other court of appeals (the First, Second, Third, Fourth, Fifth, Sixth, Eighth, Ninth and Tenth Circuits) which has considered the issue. *E.g.*, *United*

2. It is not clear from the opinion below whether the court of appeals based its conclusion that there was sufficient "compulsion" to amount to "custody" upon subjective or objective factors.

The Fifth Circuit has often made its conclusion in such cases rest upon a determination whether officers have subjectively focused their investigation on the person questioned. See *Windsor* v. *United States*, 389 F. 2d 530 (C.A. 5); *Agius* v. *United States*, 413 F. 2d 915, 918–919 (C.A. 5), certiorari denied, 397 U.S. 992; *United States* v. *Montos*, 421 F. 2d 215, 223 (C.A. 5). See also *United States* v. *De La Cruz*, 420 F. 2d 1093, 1095–1096 (C.A. 7). Other courts of appeals, however, have employed a standard under which the objective circumstances, rather than subjective feelings of the police or the suspect, are examined in determining whether *Miranda* warnings are required. See *United States* v. *Hall*, 421 F. 2d 540, 543–545 (C.A. 2), certiorari denied, 397 U.S. 990; *United States* v. *Tobin*, 429 F. 2d 1261, 1263–1264 (C.A. 8); *Lowe* v. *United States*, 407 F. 2d 1391, 1396–1397 (C.A. 9). As the court in *Lowe* concluded (407 F. 2d at 1397):

> Whether a person is in custody should not be determined by what the officer or the person being questioned thinks; there should be an objective standard. Although the officer may have an intent to make an arrest, either formed prior to, or during the questioning, this is not

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States v. *Jaskiewicz*, 433 F. 2d 415, 417–420 (C.A. 3) certiorari denied, January 25, 1971 (No. 884, O.T., 1970); *United States* v. *Prudden*, 424 F. 2d 1021, 1025–1031 (C.A. 5).

> a factor in determining whether there is present "in custody" questioning. It is the officer's statements and acts, the surrounding circumstances, gauged by a "reasonable man" test, which are determinative.

We submit this is the proper standard, and that, under this standard, the immigration agent was not obliged to warn respondent of his Fifth Amendment rights.

The purpose of *Miranda* warnings is to dispel any "inherently compelling pressures" which might coerce an unwilling individual to speak. 384 U.S. at 467. The state of mind of the individual under questioning, not the state of mind of the officer, is pertinent in determining whether such pressures exist. And although the state of mind of the suspect is the relevant criterion, it is neither practical nor desirable to base a decision on whether warnings should be given on what the particular individual subjectively thought. It is the officer, after all, who must decide whether to advise an individual of his rights. He cannot be expected reasonably to base this decision on his guess regarding the subjective feelings of the individual, for different individuals may be affected in quite different ways by the same circumstances. For example, a man who knows he is guilty may feel much more compulsion that one who is certain he has nothing to fear. The officer must act, and courts ultimately should judge his decision, on the basis of "what a reasonable man, innocent of any crime, would have thought had he been in the defendant's shoes." *Hicks* v. *United States,* 382 F. 2d 158, 161 (C.A. D.C.). Judge

Friendly ably summarized the difficulties of a standard based on subjective factors in *Hall, supra,* 421 F. 2d at 544:

> The Court [in *Miranda*] could scarcely have intended the issue whether the person being interrogated had "been taken into custody or otherwise deprived of his * * * [freedom of action] in any significant way" to be decided by swearing contests in which officers would regularly maintain their lack of intention to assert power over a suspect save when the circumstances would make such a claim absurd, and defendants would assert with equal regularity that they considered themselves to be significantly deprived of their liberty the minute officers began to inquire of them. Moreover, any formulation making the need for *Miranda* warnings depend upon how each individual being questioned perceived his situation would require a prescience neither the police nor anyone else possesses. On the other hand, a standard hinging on the inner intentions of the police would fail to recognize *Miranda's* concern with the coercive effect of the "atmosphere" from the point of view of the person being questioned.

The court below appears to have been concerned with the effect of the agent's suspicion when he asked to see the card again (App. 127, 129). But the suspicion of an officer, regardless of the degree, is not by itself so inherently coercive as to constitute the equivalent of custody. As Judge Friendly pointed out in *Hall,* 421 F. 2d at 544:

> Clearly the Court meant that *something* more than official interrogation must be shown [to require warnings]. It is hard to suppose that suspicion alone was thought to constitute that something; almost all official interrogation of persons who later become criminal defendants stems from that very source. While the Court's language in *Miranda* was imprecise, doubtless deliberately so, it conveys a flavor of some affirmative action by the authorities other than polite interrogation. * * *

If suspicion alone sufficed to trigger the necessity for warnings, routine law enforcement activity, such as requesting an individual suspected of driving a stolen car to produce his driver's license or questioning persons at the border as to the nature of the goods they are bringing into the country, frequently could not take place without giving *Miranda* warnings. The courts of appeals have uniformly held such questioning to fall within the category of "general on-the-scene" investigation which does not require *Miranda* warnings.[23]

Like customs agents, INS agents routinely ask numerous persons believed to be aliens about their

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[23] *E.g.*, *Lowe* v. *United States*, 407 F. 2d 1391, 1394–1396 (C.A. 9); *United States* v. *LeQuire*, 424 F. 2d 341, 343–344 (C.A. 5); *United States* v. *Tobin*, 429 F. 2d 1261, 1263–1264 (C.A. 8); *United States* v. *Charpentier*, (C.A. 10), No. 340–70 decided February 24, 1971; *United States* v. *Gibson*, 392 F. 2d 373, 375–376 (C.A. 4); *Chavez-Martinez* v. *United States*, 407 F. 2d 535, 538–539 (C.A. 9), certiorari denied, 396 U.S. 858; *United States* v. *Kurfess*, 426 F. 2d 1017, 1020 (C.A. 7), certiorari denied, 400 U.S. 830.

right to be in the United States.[24] Particularly in view of the routine nature of this activity, it is unreasonable to conclude that the simple request that an alien produce evidence that he is lawfully in the United States creates, for the normal individual, an "overbearing atmosphere" equivalent to that he would face if arrested and taken into custody. Nor, we submit, is it any more reasonable to conclude, in the circumstances of this case, that the suspicious agent's second request for the card created such pressure for a reasonable man. Accordingly, we maintain that the court of appeals erred in concluding that the agent was required to give *Miranda* warnings prior to his requests to see respondent's alien registration card even if that card was protected under the Fifth Amendment.

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[24] The power of INS agents to interrogate "any person believed to be an alien as to his right to be or remain in the United States" 8 U.S.C. 1357(a)(1) implies a limited authority to stop an individual for purposes of questioning. See *United States* v. *Montez-Hernandez*, 291 F. Supp. 712, 714–715 (E.D. Cal.); *Au Yi Lau, et al.* v. *Immigration and Naturalization Service*, No. 23,339, C.A.D.C., decided March 19, 1971; Gordon & Rosenfield, *Immigration Law and Procedure*, Section 5.2(b), pp. 5–11, and administrative cases cited at note 7d, 1970 Cum. Supp.

An individual who is temporarily detained under this power is not necessarily in custody or significantly deprived of his freedom of action within the meaning of *Miranda*, however. Police who stop and question persons in carrying out their general investigatory duties similarly are not under an obligation for that reason alone to give warnings. See, *e.g.*, *United States* v. *Tobin*, *supra*, 429 F. 2d at 1263; *Lowe* v. *United States*, *supra*, 407 F. 2d at 1394–1396; cf. *Terry* v. *Ohio*, 392 U.S. 1.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be reversed and the judgment of conviction reinstated.

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